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82-5260

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IN THE SUPREME COURT OF THE UNITED STATES

NUMBER A-28

ALVIN R. MOORE, JR.

PETITIONER

VERSUS

THE STATE OF LOUISIANA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO REVIEW

A JUDGMENT OF THE SUPREME COURT OF LOUISIANA

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August 12, 1982

82-5260

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Comes now the petitioner and respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Louisiana issued on May 17, 1982, in the State of Louisiana versus Alvin R. Moore, Jr., case number 57,718.

OPINIONS BELOW

Alvin R. Moore, Jr., was found guilty of murder under La. R.S. 30 and after a separate sentencing hearing was sentenced to death. The sentencing hearing was held under the provisions of Article 905 of the Louisiana Code of Criminal Procedure. Alvin R. Moore, Jr., was sentenced to death on October 30, 1980 by Judge Graydon Kitchens in the case entitled State of Louisiana versus Alvin R. Moore, Jr., bearing docket number 57,718 in Bossier Parish, Louisiana (Appendix A)

An appeal to the Louisiana Supreme Court was rendered on May 17, 1982 upholding the decision of the District Court. (Appendix B)

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 of the Rules of the Supreme Court of the United States.

The petition is filed within the time provided for when Justice Thurgood Marshall on July 13, 1982, granted an extension of time until August 16, 1982.

QUESTION PRESENTED

Whether the decision of the Louisiana Supreme Court can be upheld when it is in direct conflict with the case of Zant vs. Stevens 631 F.2d 397 1980 Modified 648 F.2d 446 (1981)

STATUTORY PROVISIONS CITED

La. R.S. 30 provides:

First degree murder is the killing of a human being:

- (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
- (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or police officer engaged in the performance of his lawful duties;
- (3) When the officer has a specific intent to kill to to inflict great bodily harm upon more than one person; or
- (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purpose of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury."

La. C.C.P. Article 905.3 provides:

" A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstances exists and, after consideration of any mitigating circumstances recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

STATEMENT

Alvin R. Moore, Jr., was charged in the 26th Judicial District Court in and for the Parish of Bossier, with violation of L.R.S. 30 which is known as the first degree murder statute. After a separate sentencing hearing he was sentenced to death. The statutory provisions are as follows:

L.R.S. 30 provides:

"First degree murder is the killing of a human being."

- "(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;
- (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or police officer engaged in the performance of his lawful duties;
- (3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
- (4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

For the purpose of Paragraph (2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistance district attorney, or district attorney's investigator.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury."

Louisiana Code of Criminal Procedure Article 905.3 provides:

Sentence of death; jury findings

"A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

In this case the jury found three aggravating circumstances under Article 905.4 of the Louisiana Code of Criminal Procedure. These circumstances were;

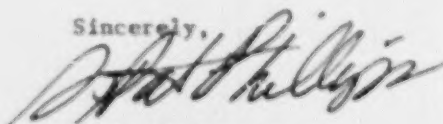
- " (1) The offender was engaged in the commission or attempted commission of aggravated rape, aggravated burglary and armed robbery;
- " (2) The offender knowingly created a risk of death or great bodily harm to more than one person;
- " (3) The offense was committed in an especially heinous, atrocious or cruel manner."

The court then went on to find that circumstance # 2 was not borne out by the evidence. This case follows the case of State vs. Moore 397 So. 2d 1258 (La.1981) where the same proposition was presented to the Supreme Court of Louisiana. We understand that the Moore case is presently before this court as is the case of State vs. Sonnier 402 So.2d 650 and State vs. Mattheson 407 So.2d 1150 also Louisiana cases.

The Louisiana Supreme Court has seen fit in the Moore case to ignore the specific holding of Stevens vs. Zant 631 Fed. 2d 397 5th Circuit. The Louisiana Supreme Court when it considered Zant, enumerated the premise of state law relied upon when it reasoned the decision.

We would respectfully request that the writ in this case be granted.

Sincerely,



S. Patrick Phillips
1648 Benton Road
Bossier City, Louisiana 71111

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument was served upon the following parties by mailing such true and correct copies, postage prepaid, this the 12th day of August, 1982.

Henry N. Brown, Jr.
District Attorney in and for
the 26th Judicial District Court
of Louisiana
Bossier Parish Court House
Benton, Louisiana 71006

William J. Guate, Jr., Attorney General
for the State of Louisiana
State Capitol Building
Baton Rouge, Louisiana 70804

Supreme Court of State of Louisiana
301 Loyola Avenue
New Orleans, Louisiana 70112


S. PATRICK PHILLIPS

STATE OF LOUISIANA

VERSUS

ALVIN R. MOORE, JR.

No. 57,718

In Twenty-Sixth District Court
Bossier Parish, Louisiana

In the above numbered and entitled case, by reason of the law and the evidence being in favor thereof,
and by further reason of a bill of indictment, charging the defendant, Alvin R. Moore, Jr.

with the crime of
First Degree Murder, he being represented by Attorney J. Stacy Freeman,
14th Floor, Slattery Bldg., Shreveport, Louisiana

and considering the verdict of guilty after due trial

~~and a finding of guilty after a trial by jury~~

IT IS ORDERED, ADJUDGED AND DECREED that said defendant, age Twenty-one (21) years,

be confined as hereafter in the Louisiana State Dept. of Corrections for a period of death sentence

to date from
his incarceration, ~~expiration of sentence to run concurrently with sentence in No. _____~~, this day signed
~~at New Orleans~~

subject to the commutation laws of this State, and pay all costs of this prosecution.

The Sheriff of Bossier Parish will convey and deliver him, the said defendant, to the keeper of said institution,
who will so keep him until discharged according to law.

Judgment rendered, read and signed in open Court, and in the presence of the accused, on this 1st

March 1981

Graydon K. Kitchen
Judge Twenty-Sixth District of Louisiana

STATEMENT OF FACTS

On July 9, 1981, Dennis Sloan and Arthur Stewart, Jr. accompanied Alvin Moore, Jr. to St. Charles St., Bossier City, La., where Alvin Moore, Jr. entered the residence of Jo Ann Wilson and therein raped Jo Ann Wilson; leaving her four month old daughter in her crib. Following this Dennis Sloan along with Arthur Stewart, Jr. and Alvin Moore, Jr. entered the residence and stole money and other items from the house. Alvin Moore, Jr. then stabbed Jo Ann Wilson to death. Some fourteen wounds were found in the victim.

A certified copy of the court minutes is attached hereto.

A true copy:

FILED

Deputy Clerk of Court.

MAR 5 1981
Scott L. Brumfield
DEPUTY CLERK
26TH JUDICIAL DISTRICT COURT
BOSSIER PARISH, LOUISIANA

Graydon K. Kitchen
Judge Twenty-Sixth District of Louisiana.

District Attorney 26th District of Louisiana.

MAY 17 1982

SUPREME COURT OF LOUISIANA

NO. 81-KA-1118

STATE OF LOUISIANA

VERSUS

ALVIN R. MOORE, JR.

ON APPEAL FROM THE TWENTY-SIXTH JUDICIAL
DISTRICT COURT, PARISH OF BOSSIER,
HONORABLE GRAYDON K. KITCHENS, JR., JUDGE

WATSON, Justice.

Defendant, Alvin R. Moore, Jr., was convicted of the first degree murder of Jo Ann Wilson in violation of LSA-R.S. 14:30. The jury unanimously decided that the death penalty should be imposed on the basis of three statutory aggravating circumstances:

- "(a) The offender was engaged in the commission or attempted commission of aggravated rape, aggravated burglary and armed robbery;
- "(b) The offender knowingly created a risk of death or great bodily harm to more than one person;
- "(c) The offense was committed in an especially heinous, atrocious or cruel manner." (Tr. 40)

Defendant has appealed his conviction and sentence assigning six errors by the trial court.

FACTS

Aaron Wilson, his wife Jo Ann, and their four month old daughter Regina resided at 804 St. Charles Street in Bossier City, Louisiana. Jo Ann Wilson was a slender woman, who weighed between 95 and 100 pounds. Alvin Moore, Jr. was a former neighbor and co-worker with Aaron at the V.A. Hospital. On July 9, 1980, Alvin Moore, Jr. picked up two companions, Arthur Lee Stewart, Jr. and Dennis Sloan, in his light blue 1962 Chevrolet. Moore and Sloan were twenty years old and Stewart nineteen. The three rode around Shreveport, visiting, laughing and talking. Moore then said he wanted to go to Bossier City to "check on his old house". (Tr. 584) Moore had previously resided at 833 St. Charles Street.

Observing that Aaron Wilson's automobile was not present, Moore went to the Wilsons' house with the announced purpose of getting "some money". (Tr. 631) According to Sloan, Moore knocked on the Wilson door, Jo Ann Wilson came to the door; she and Moore talked briefly and then entered the house together. Five minutes later, Sloan followed Moore to the door of the house. The door was cracked and Sloan saw Moore and Jo Ann Wilson "making sex" (Tr. 631) on the floor of the living room. Sloan returned to tell Stewart what was happening. Stewart and Sloan then entered the house. Moore and a crying Mrs. Wilson had gone into the bedroom where baby Regina was also crying. Moore was "going crazy", ransacking the house. (Tr. 593) Jo Ann Wilson was described as "panicky" and "scared". (Tr. 592) She appeared to be frightened of Moore. Jo Ann Wilson said: "take whatever

you want, just get out of my house." (Tr. 612) and "just don't harm her or the child". (Tr. 632) After being threatened, Mrs. Wilson had given a box containing Kennedy half dollars to Moore. Sloan took a white bucket with \$18.80 in pennies, and Stewart took some stereo components. They left the house and heard Jo Ann Wilson screaming behind them.

Moore ran out about five minutes later carrying a knife in his hand. Stewart testified that this was the same knife that Moore had had on the back seat of his car as the group drove to St. Charles Street. Moore told Stewart and Sloan, "I'm fixing to trip you all out ... I stabbed that bitch nine times." (Tr. 594-595) The three then proceeded to Church's Fried Chicken and McDonald's.

Jo Ann Wilson managed to call the police emergency number. The call was received by the Bossier City Police Department at 9:40 P.M. and a unit was dispatched. Patrolman Fields knocked on the door in approximately two minutes; Jo Ann Wilson said she was unable to open it. He kicked in the door. There was blood all over the living room and the victim was lying on the bed in the bedroom. Both rooms were disarranged. Jo Ann Wilson was nude from the waist down, bleeding from her vagina, her chest and both arms. She was having difficulty in breathing, and told Officer Fields she was dying. He asked who had stabbed her and she responded "Elvin". When asked if she knew "Elvin", she replied that he "was a black guy that used to live down the street". (Tr. 355) It was obvious to Officer Fields that she was dying. She lived approximately ten minutes after her

dying declaration. Moore was arrested at approximately 1:00 A.M. on July 10. In the trunk of his car were the Wilsons' stereo components, a quantity of pennies and a white plastic bucket.

Dr. George M. McCormick, II, coroner of Bossier Parish and a forensic pathologist, did the autopsy. Jo Ann Wilson had thirteen wounds which could be identified as stab wounds and three other minor wounds. She was wounded on her shoulders, arms, chest, back, and in the pelvic and abdominal areas. Seven of her stab wounds were potentially fatal. She died from loss of blood and shock. Her demise was described as follows:

"...the person starts to have a rapid heart rate, decreased blood pressure, possibly sweating and claminess, a sense of impending doom and gradually over a period of time loss of consciousness and finally death." (Tr. 496)

Dr. McCormick found her dying declaration not inconsistent with the wounds she had received. Jo Ann Wilson had had recent vaginal and rectal intercourse, both with ejaculation, probably within six to eight hours of the autopsy. There was a scar from the Caesarean delivery of her daughter. Some foreign hair in the vagina was removed.

Blood flakes from Moore's pants tested out as blood group O. Victim Wilson had blood group O. Sloan, Stewart, and Moore had blood group B. No blood was found on the clothing of either Stewart or Sloan. The foreign pubic hairs from Jo Ann Wilson did not match those of Sloan, Stewart or her husband, but exactly matched the pubic hair characteristics of Alvin Moore. One hair on the bed sheet matched all the characteristics of Alvin Moore's pubic hair.

Moore took the stand in his defense. He claimed that his intercourse with Jo Ann Wilson was voluntary; and that he had had voluntary intercourse with her on two previous occasions in May and June. In May, she had also given him money. He stated that he did not take the Kennedy half dollars; she gave them to him. Moore denied any knowledge of the stabbing.

Immediately before trial, Stewart and Sloan pled guilty to aggravated burglary. It was agreed that the State would recommend the maximum sentence of thirty years for each of them. Detective Glen Sproles, the chief investigating officer on the case, testified that he had discussed with defense counsel "during the pre-trial" (Tr. 438) the fact that Dennis Sloan was going to plead guilty to aggravated burglary. Sloan's attorney, Patrick Phillips, testified that he had constantly attempted to secure an acceptable plea bargain for his client. This bargain was reached on Friday but not accepted by Sloan until the following Monday, the day of trial.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant contends that a continuance should have been granted when Stewart and Sloan pled guilty to aggravated burglary immediately prior to trial. Defendants were indicted on July 22, 1980, and arraigned on July 29. Trial was set for September 22, 1980. A motion for severance was denied on September 16, 1980. At that time, defense counsel also argued that he was entitled to a continuance. A discovery motion was

answered on the same date. The answer to the motion included the forensic pathologist's report, the statements of the two co-defendants, and the report of the crime laboratory. Because of defense counsel's need to study these materials, a continuance was granted until October 27 when trial began. On October 27, defense counsel requested the additional continuance.

As a result of the co-defendants' pleas, defense counsel received the trial severance which he had requested. According to Detective Sproles' testimony, he was on notice that at least one of the co-defendants might plead guilty prior to trial. However, it is contended that their pleas changed the trial strategy and caused Moore to testify.

The question is whether denial of the continuance was prejudicial. Compare *State v. Sims*, 346 So.2d 664 (La., 1977).

In view of the dying declaration of Jo Ann Wilson and the physical evidence of Moore's guilt, he would surely have been convicted regardless of whether or not his co-defendants were tried at the same time. Their evidence against him was merely cumulative. Moore's were the pants with the victim's blood on them. He was the one named in the dying declaration. It was his car which contained the stolen goods. It was his pubic hair that was found in the victim.

The statements of the co-defendants had informed defense counsel of the gist of their testimony. He had their criminal records. Stewart and Sloan were cross-examined about those records. Sloan admitted a 1979 conviction of aggravated battery, reduced from a charge

of attempted murder. Sloan also admitted a 1979 arrest for attempted armed robbery. Stewart admitted to some juvenile trouble and a theft conviction.

It is argued that Moore's testimony was the only means of impeaching the testimony of the co-defendants. However, Moore did not seek to shift the blame for the killing to either Sloan or Stewart. They did not dispute his contention that the intercourse with Jo Ann Wilson was consensual. Moore's testimony was not credible because of the physical evidence, not because it was contradicted by his co-defendants.

There is evidence that the co-defendants' pleas were not completely unexpected. Compare State v. Parsley, 369 So.2d 1292 (La., 1979).

Under these circumstances, defendant has not established any prejudice in the trial court's denial of a further continuance.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

Defendant contends that a mistrial should have been granted when the district attorney's opening statement indicated that the defendant should take the stand in his own defense. The district attorney stated:

"What is evidence comes from the witness stand and when I tell you something in this opening statement I want you to remember it, but I want you to remember whether or not I proved it with evidence from this stand, competent evidence from this witness stand. And if the defense decides to give an opening statement to say what they intend to prove you hold him to the same thing. You don't let me talk without me proving what I say. The same goes for the defense counsel. Don't let him talk unless he produces proof to support what he has to say." (Tr. 322)

It is argued that the district attorney inferred there had to be evidence of innocence, and the only evidence which could be produced was defendant's testimony. Thus, these prejudicial remarks, together with the prejudice caused by the last minute severance and the denial of motion for continuance, forced defendant to testify.

Direct or indirect reference by the prosecution to the accused's failure to testify is a ground for mistrial. LSA-Cr.P. art. 770. In some instances, a reference to the State's testimony as uncontroverted focuses attention on the defendant's failure to testify. *State v. Harvill*, 403 So.2d 706 (La., 1981). However, this remark about the need for proof of facts alleged in an opening statement is not that type of reference. In *Harvill*, the comment was clearly prejudicial, because "only the defendant could recant the taped confession which formed the entirety of the prosecution's case against him." 403 So.2d 711. Here, in contrast to *Harvill*, any connection between the statement and the type of comment prohibited by Article 770 is very vague. Also, unlike *Harvill*, the physical evidence against Moore is overwhelming. Moore did take the stand and, with these facts, could not have relied on the presumption of innocence. There was no prejudice. The district attorney was merely cautioning the jury not to accept opening statements as evidence. He was not commenting on the defendant's possible failure to testify.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

It is contended that certain photographs of the crime scene should not have been allowed in evidence because they inflamed the jury by emphasizing the violence of the crime and depicted a bloody shirt and a stereo speaker which were not introduced into evidence.

The photographs were material and admissible. Their prejudicial effect is outweighed by their probative value. *State v. Boyer*, 406 So.2d 143 (La., 1981); *State v. Vernon*, 385 So.2d 200 (La., 1980). The items in the photographs would have been admissible evidence. *State v. Morris*, 340 So.2d 195 (La., 1976); *State v. Hawthorne*, 345 So.2d 1170 (La., 1977). Their depiction was allowable.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR

Defense counsel contended that he was entitled to a "rap sheet" on the victim in order to impeach her dying declaration. The State replied: "we have no criminal record on Jo Ann, we know nothing about her except for good things. I can't -- I can't produce a criminal record because we have none on her." (Tr. 433) The defense asked that the State have the police run a record check on Jo Ann Wilson. The State responded: "We have previously given to Mr. Freeman all the criminal record reports that we have on the parties involved in this particular matter. There were three such, what we call

rap sheets, that were furnished to Mr. Freeman. Those are the only rap sheets that we have involved in this case." (Tr. 436)

Detective Sproles, the investigating officer, was asked:

"Q. All right, sir, did you, as the investigating officer, do any investigation, and I mean as in any way, shape or form, in talking to neighbors, or in getting police records or anything about the background of the victim?

"A. We had search teams out there, I was not a part of one of the search teams. I did request through our records department for a check of anything on the three suspects we had or the victim.

"Q. All right, did anything come back?

"A. Not on the victim. no sir.

"Q. Did you run a -- did you ask for a record of the victim?

"A. I asked for a records check from our record's department, yes sir.

"Q. All right, do we have anything, are any of those so called rap sheets, I don't know what else to call them, that's the best I can do, do you have a rap sheet on Jo Ann Wilson?

"A. No, sir.

"Q. Did you request one?

"A. I didn't particularly request a rap sheet, no sir." (Tr. 446)

The above does not suggest that Jo Ann Wilson had a "rap sheet". It appears probable that she did not.

The trial court refused to order the State to request a "rap sheet" on Jo Ann Wilson, but noted that the State was under a continuing order to produce any Brady¹ information, which would include conviction

¹Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

records of the victim. See State v. Henderson, 362 So.2d 1358 (La., 1978); State v. Harvey, 358 So.2d 1224 (La., 1978). This is all that is required.

The State did not have a "rap sheet" on Jo Ann Wilson. The indication is that one did not exist. The trial court properly ruled that the State was not required to make a further search for a conviction record on Jo Ann Wilson. State v. Washington, 407 So.2d 1138 (La., 1981).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

Defendant contends that the trial court erred in allowing certain hearsay evidence. LSA-R.S. 15:434.

Moore was quoted as saying he wanted to "check on his old house." (Tr. 584) The statement was allowed in evidence for its non-assertive value. It proved that the words had been spoken, not that they were true. See State v. Hatcher, 372 So.2d 1024 at 1032 (La., 1979). Thus, the evidence was not hearsay. It was relevant to show that the words were spoken by Moore prior to the parties' trip to Bossier City. There was no prejudice in allowing the statement into evidence because Moore admitted on the witness stand that he had gone with his companions to his old neighborhood on the day of the crime.

Defendant also contends that other statements made by Moore immediately before and after the crime should

have been excluded as hearsay. These statements took place as immediate concomitants of Moore's criminal act. His spontaneous words uttered close in time to the occurrence were properly admitted into evidence as res gestae. LSA-R.S. 15:447; 15:448.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER SIX

Defendant contends that the prosecutor's closing argument contained highly prejudicial comments which violated his constitutional rights to due process of law. The prosecutor stated:

"...Today we're here also to protect the innocence and the future victims of crime. Dennis Sloan is not an innocent person, neither is Arthur Stewart, Jr. and by no means is this defendant today, Alvin R. Moore, Jr. Let's not forget who is the innocent party in this case. It's Jo Ann Wilson, her child, Regina, her husband, Aaron, her mother and father and sister. They are the innocent victims of this tragic, and terrible crime. Let's not forget about these people because that's what justice is about, not to forget about them. (Tr. 731)

* * *

"She's the innocent victim of this crime. And justice requires that you vote guilty and you vote for life when you do. The life of every one of us to walk the streets free from this type of people. We're voting for our lives, the lives of our families to be free from this type of activity. Thank you." (Tr. 738)

There was no objection by defense counsel to these remarks. However, despite lack of objection, extremely inflammatory and prejudicial remarks require reversal. State v. Hayes, 364 So.2d 923 (La., 1978); State v. Lee, 346 So.2d 682 (La., 1977). It is not clear why defense counsel failed to object to the prosecutor's argument.

There was no motion for a mistrial at the conclusion of the closing statement. *State v. Gaines*, 354 So.2d 548 (La., 1978). Defense counsel indicated that he deliberately refrained from objection while listening to the prosecutor's "plea for pity". (Tr. 745)

A prosecutor should avoid remarks predicting societal costs and consequences of a not guilty verdict. *State v. Barrow*, 410 So.2d 1070 (La., 1982). However, "substantial evidence against defendant in the record prevents the errors in the prosecutor's argument from becoming such violations of due process rights that would require a reversal in the absence of defense objections." *State v. Hayes*, 364 So.2d 923 at 927 (La., 1978). In view of the overwhelming evidence of Moore's guilt, it is unlikely that the prosecutor's argument contributed to the verdict.

This assignment lacks merit.

DEATH SENTENCE REVIEW

Every sentence of death must be reviewed to determine if it is excessive. LSA-C.Cr.P. art. 905.9. The factors in that determination are set out in Supreme Court Rule 28. This court must determine: (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and (c) whether the sentence is disproportionate to the penalty imposed in similar cases.

A. PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS:

At the sentencing hearing, the prosecutor advised the jury that "From the next point forward it goes to the court system to be thoroughly reviewed and checked through every court in this land." (Tr. 776) The prosecutor's reference to appellate review was, of course, inaccurate and misleading. "Any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error." State v. Mattheson, 407 So.2d 1150 at 1165 (La., 1981).

In State v. Willie, 410 So.2d 1019 (La., 1982), a more prejudicial argument resulted in the sentence being vacated.² The prosecution here did not give the impression that the jury was making only a tentative determination. On the contrary, the difficulty of the jury's decision was emphasized. The remarks here are not so prejudicial that the sentence must be vacated. As in State v. Mattheson, 407 So.2d 1150 (La., 1981), the references, although close to reversible error, did not induce the jury to believe that its responsibility was lessened by appellate review. The most objectionable phrase, "through every court in the land", is more in the nature of hyperbole than anything else. The remark did not deprive defendant of a fair trial in the sentencing phase.

In considering whether the verdict was influenced by prejudice, it is significant that the three co-defendants were black and the victim was white, as were all of the

²The writer dissented from this feature of the Willie decision.

jurors. However, there is no reference at any point in the record to color, or appeal to racial prejudice. The crime was both violent and senseless; there is no indication that the verdict was influenced by prejudice.

B. AGGRAVATING CIRCUMSTANCES:

The jury found three aggravating circumstances:

- "(1) The offender was engaged in the commission or attempted commission of aggravated rape, aggravated burglary and armed robbery;
- "(2) The offender knowingly created a risk of death or great bodily harm to more than one person;
- "(3) The offense was committed in an especially heinous, atrocious or cruel manner." (Tr. 40)

(1) Since Jo Ann Wilson was observed having sex on her living room floor; the intercourse was both vaginal and anal; she afterward appeared frightened of Moore; and she was subsequently stabbed by Moore, the jury could have reasonably inferred that the sexual encounter between the two was not voluntary and that Jo Ann Wilson consented to it only because Moore had the knife with which she was subsequently killed. Thus, the jury could have found that Moore was engaged in the commission of aggravated rape. While there is some evidence that Moore's entry into the house was not forcible, Jo Ann Wilson was robbed and Moore was obviously armed. The jury could also have reasonably concluded that Moore committed an armed robbery.

(2) In finding that Moore created a risk of death or great bodily harm to more than one person, the jurors were apparently thinking of baby Regina. Although the murder of her mother certainly placed the child in an unprotected situation, she was not harmed or threatened. The evidence does not support this aggravating circumstance.

(3) Because of the number of wounds inflicted and the fact that Jo Ann Wilson died slowly with awareness of her impending death, the jury could reasonably have found that the offense was committed in an especially heinous, atrocious and cruel manner.

It is unnecessary for all three aggravating factors to be present. *State v. Monroe*, 397 So.2d 1258 (La., 1981). Two of the statutory aggravating circumstances found by the jury are present.

C. PROPORTIONALITY:

The only comparable crime is that reported in *State v. Gaskin*, ___ So.2d ___ (La., 1982) No. 81-KA-1629. Three white males picked up a young black girl in their car. They made her perform oral sex upon them, robbed her, and then stabbed her. Although two of them, Gaskin and Thomley, were found guilty of first degree murder, the jury recommended life imprisonment.

There are some distinguishing features in the two murders. The crime here took place in Jo Ann Wilson's home, which has traditionally been considered a place of security and sanctuary. In the Gaskin crime, the guilt was shared by two men because Thomley cut the victim's throat and Gaskin then stabbed her. Apparently, Gaskin

and Thomley did not take the stand to impugn the character of their victim as did Moore. Moore's testimony on the stand was incredible and the jury undoubtedly felt more strongly about the offense because he slandered his victim and showed no remorse. It is impossible to compare the sex crimes in the two cases. The oral sex demanded from Gaskin and Thomley's victim was repugnant as was Jo Ann Wilson's anal and vaginal rape. However, Virginia Smith, the victim of Gaskin and Thomley, did not suffer the bodily invasion inflicted on Jo Ann Wilson. The jury may also have been influenced by the fact that Jo Ann Wilson was a young mother whose four month old baby not only witnessed her death, but was left motherless as a result. The child, as well as the mother, was a victim.

Gaskin was seventeen years of age at the time of his crime and Thomley a year older; Moore was twenty. A jury could understandably be more reluctant to impose a death sentence on a seventeen year old. Also, Gaskin is a person with mental, educational and emotional limitations. Moore, on the other hand, graduated in the middle of his high school class. He did not have a disadvantaged childhood, but has had a propensity for violence since his high school years.

Considering all the circumstances, the sentence of death imposed on Moore is not disproportionate to the sentence of life imprisonment imposed on Gaskin and Thomley.

For the foregoing reasons, the conviction and
sentence of defendant, Alvin R. Moore, Jr., are affirmed.

AFFIRMED.

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IN THE SUPREME COURT OF THE UNITED STATES

NUMBER: ~~82-5260~~ 82-5260

ALVIN R. MOORE, JR.
Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

RECEIVED

OCT 4 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ANSWER TO PETITION FOR WRIT OF CERTIORARI
TO REVIEW A JUDGMENT OF THE LOUISIANA SUPREME COURT

NOW INTO COURT comes and appears the State of Louisiana, through the undersigned District Attorney who respectfully responds to the petition for Writ of Certiorari as follows:

1.

Alvin R. Moore, Jr. was found guilty of First Degree Murder and the death penalty was recommended by the jury, said penalty being imposed by the judge. An appeal was taken to the Louisiana Supreme Court which affirmed the conviction and death sentence and now Alvin R. Moore, Jr. has applied to this Honorable Court requesting that it review his case.

2.

The only question presented to this Court concerns the sentencing hearing in which the jury found three aggravating circumstances existing during the commission of the crime. It is the contention of the defendant, Alvin R. Moore, Jr., that the jury's finding that the defendant's actions, did in fact create a risk of death or great bodily harm toward more than one person was not supported by the evidence presented at his trial and therefore should not have been considered in the imposition of the death penalty. In truth, the aggravating circumstance referred to was substantiated by the evidence presented to the jury.

3.

The jury found that the offense was committed during the perpetration or attempted perpetration of aggravated rape,

aggravated burglary and armed robbery and that the offense was committed in a heinous, atrocious and cruel manner, and further, that the offender knowingly created a risk of death or great bodily harm to more than one person.

4.

The evidence presented at the trial did in fact support the recommendation by the jury that the death penalty be imposed. The evidence showed that the defendant, Alvin R. Moore, Jr. entered the home of the victim, Joanne Wilson, and that she had with her, a four month old child. The evidence showed that Alvin R. Moore, Jr. raped, robbed and killed Joanne Wilson and that in the process Joanne Wilson begged, not only for her life, but for the life of her four month old daughter. The evidence clearly demonstrated that Joanne Wilson was extremely afraid for the life of her four month old daughter, as well as her own life, and agreed to do anything Alvin R. Moore, Jr. wanted if he simply would allow both the daughter and her to go unharmed.

5.

The Louisiana Supreme Court, in its decision, did state in a very short paragraph that the evidence did not support the aggravating circumstances that the crime created a risk of death or great bodily harm to more than one person. However, the Louisiana Supreme Court did not strongly consider the evidence and simply was incorrect in such an assessment. The evidence did exist and did support such an aggravating circumstance.

6.

In any event, the jury found two additional aggravating circumstances which were more than sufficient to warrant the imposition of the death penalty.

7.

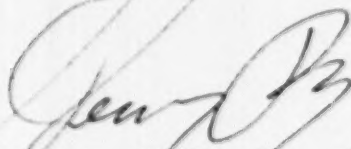
It is the contention of the State of Louisiana that in as much as all of the Constitutional issues in this matter were decided by the Louisiana Supreme Court, that there is

nothing properly before this court for review.

CONCLUSION

Only one issue has been presented to this Honorable Court in the application for a review by the Defendant. This issue has been properly dealt with by the Louisiana Supreme Court in its decision which was attached to the original writ. The writ should be denied and the matter remanded to the Louisiana Supreme Court for appropriate action.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Henry N. Brown, Jr.", is written over a large, light-colored diagonal line that spans across the signature area and extends towards the right margin.

HENRY N. BROWN, JR.
DISTRICT ATTORNEY
26th Judicial District
P. O. Box 69
Benton, Louisiana 71006

C E R T I F I C A T E

I hereby certify that a copy of the foregoing Answer to Petition for Writ of Certiorari to Review a Judgment of the Louisiana Supreme Court was mailed with proper postage affixed this date to Mr. J. Stacey Freeman, Esq., 1648 Benton Rd., Bossier City, LA 71111 and Mr. Randal Fish, Esq., 1648 Benton Rd., Bossier City, LA 71111.

BENTON, LOUISIANA, this 1st day of October, 1982.



HENRY N. BROWN, JR.